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No.....

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1940

KARL B. SEGALL, Transferee,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

WALTER F. TANT, Transferee,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT (OR WRITS) OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable the Supreme Court of the United States:

Now come the petitioners, Karl B. Segall, Transferee and Walter F. Tant, Transferee, by their attorney, Don M. Harlan, and respectfully pray for the issuance of a writ or writs of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review the judgment or judgments of that Court entered in this cause (on denial of petition for rehearing) under date of December 11th, 1940, and in support of this application, respectfully show as follows;

I. SUMMARY STATEMENT OF PLEADINGS AND DECISIONS

The record in the Circuit Court of Appeals, Sixth Circuit, a certified copy of which is presented herewith, shows the following;

The Commissioner of Internal Revenue issued notices of deficiency to the above petitioners on September 16, 1935 for alleged deficiencies in income tax for the year 1932 in the amount of $113,091.43 (R. 7-153). Such amount was assessed against these petitioners as Transferees of Silent Automatic Corporation.

On December 9th, and 13th, 1935 these petitioners filed petitions with the United States Board of Tax Appeals to redetermine the alleged deficiencies in income tax for the year 1932 (R. 3-149).

Said petitions raised two major questions or issues to-wit, (1) Did the transactions pursuant to the agreement of October 2, 1931, between the Timken-Detroit Company and Silent Automatic Corporation accomplish a tax-free reorganization as provided in section 112 (b) (4) and (d) (1) of the Revenue Act of 1928 or 1932, and (2) was the transaction completed and the profit, if any, taxable in 1931 or 1932? (R. 27-28).

The Board of Tax Appeals reversed the Commissioner of Internal Revenue and in so doing held that said transaction amounted in law to a tax-free reorganization. The Board made no decision upon the remaining question (2) above but expressly withheld decision of that question, stating at R. 30 as follows,

"In view of our decision, it is unnecessary to discuss the remaining issue."

On October 3, 1938 the Commissioner of Internal Revenue, Respondent herein, filed petition for review of the Decision of said Board of Tax Appeals entered on July 15, 1938 and assigned error (Assignments 1-12, R. 36-37). *None of said twelve assignments of error related to question* (2) *above and the record is entirely devoid of any decision of said question* (2) *and of any assignments of error from any alleged determination of such issue.*

On September 16, 1940 the Circuit Court of Appeals, Sixth Circuit, entered judgment of REVERSAL of said Board of Tax Appeals not only upon the question decided by said Board but also upon the question reserved by said Board of Tax Appeals and remanded said cause to said Board for computation of the income tax liability of petitioners. (114 F. (2d) 706) (R-179-180).

The said two cases raised by separate notices of deficiency and separate appeals to the Board were consolidated for record, briefing, hearing and decision by order of the Circuit Court of Appeals. (R. 143) Petitioners request that said cases be treated as consolidated for the purposes of this application and that one writ of certiorari be issued to require certification of both causes to this Court.

The findings of fact and opinion rendered by the Board of Tax Appeals appears at R. 20-30 and is reported in 38 B. T. A. 43.

The opinion of the Circuit Court of Appeals for the Sixth Circuit is annexed and is reported in 114 F. (2d) 706. The petitioners herein filed petition for rehearing and redetermination of the decision and judgment of the Circuit Court of Appeals of the Sixth Circuit, a certified copy of which is filed herewith, and on December 11th, 1940 the said Circuit Court of Appeals entered final judgment in this cause DENYING petition for rehearing and redetermination. As a result thereof final judgment of said Circuit Court of Appeals for the Sixth Circuit was entered on said December 11th, 1940 and was against the petitioners herein and contrary to their rights and interest and violative of the DUE PROCESS clause of the Constitution of the United States in that same denied these petitioners their DAY IN COURT and deprived petitioners of a trial of the original question as to the proper tax year in a tribunal having original jurisdiction thereof, inasmuch as the jurisdiction of said Circuit Court of Appeals is APPELLATE ONLY.

II. SUMMARY STATEMENT OF ISSUES PRESENTED

The record in this case therefore presents the following major questions;

(1) Does a Circuit Court of Appeals have jurisdiction to REVERSE the Board of Tax Appeals upon an issue not decided by said Board and upon issues not raised by any assignments of error?

(2) If the answer to the foregoing question is in the affirmative—does not the opinion of said Circuit Court of Appeals *conflict* with decisions of the same or similar

questions by Circuit Courts of Appeal of Circuits other than the Sixth Circuit?

(3) Was the Circuit Court of Appeals in error in holding as follows,

> "Respondents argue that their contention is supported by Helvering v. Minnesota Tea Co., 296 U. S. 378; 56 S. Ct. 269, 80 L. Ed. 284; Nelson Co., v. Helvering, 296 U. S. 374, 56 S. Ct. 273, 80 L. Ed 821, and Helvering v. Watts, 296 U. S. 387, 56 S. Ct. 275, 80 L. Ed. 289. We disagree. In each of those cases, the transferor retained what Mr. Justice Roberts recently called a "proprietary interest in the enterprise," in the form of common or preferred stock. LeTulle v. Scofield, 308 U. S. 415, 421, 60 S. Ct. 313, 316, 84 L. Ed. 355. Interest of this nature was lacking in the instant case, the Silent Automatic having received only cash and debentures."

(4) Does the LeTulle case, Supra, which admittedly contained nothing but *obiter* upon the question of reorganization, constitute any *rule of law* for the determination of the question of reorganization involved in the instant case?

(5) Does the case of Lucas v. North Texas Lumber Co., 281 U. S. 11, 50 S. Ct. 184, 74 L. Ed. 668 and which was relied upon by the Circuit Court of Appeals as determinative of the instant case, (114 F. (2d) 710) and which admittedly involved a ten-day option to purchase timber lands, furnish any *rule of law* whatever for the determination of the instant case, which admittedly involved a binding obligation to purchase entered into on October 2, 1931?

(6) Does not the opinion of the court in the instant case *conflict* with decisions entered and rendered in the following cases, towit, Commissioner v. North Jersey Title Ins. Co., 79 F. (2d) 492—C. C. A.—3; Brunton v. Commissioner, 42 F. (2d) 81—C. C. A.—9; United States v. Utah-Idaho Sugar Co., 96 F. (2d) 756—C. C. A. 10; Helvering v. Nibley—Mimnaugh Lbr. Co., 70 F. (2d) 843—C. A. D. C.; and Newaygo Portland Cement Co., v. Commissioner, 77 F. (2d) 536, 64 App. D. C. 278.

(7) Upon the question of the jurisdiction of a Court of Appeals to REVERSE the Board of Tax Appeals upon matters and questions not passed upon by said Board, does not the jurisdiction *asserted* in the instant proceeding *conflict* with decisions upon the same question as decided in the following cases, towit, Helvering v. Rankin, 295 U. S. 123, 79 L. Ed. 1343, 35-1 USTC 9343; Gen. Utilities & Operating Co., v. Helvering, 296 U. S. 200, 56 S. Ct. 185, 36-1 USTC 9012; Helvering v. Savage, 297 U. S. 106, 36-1 USTC 9064; Champlin v. Commissioner, 78 F. (2d) 905-(C. C. A. 10); Allen v. Parmalee, 142 F. 354, 73 C. C. A. 402; and Helvering v. National Grocery Co., 304 U. S. 282, 38-2 USTC 9312.

III. SUMMARY STATEMENT OF MATTER INVOLVED

The agreement over which this dispute arises appears at R. 56-63. The findings of fact filed by the Board of Tax Appeals appear at R. 20-27. Those findings are correct with the single exception that "October 31, 1931" (R. 27) should read "August 31, 1931"—(See R. 21).

The Board entered decision of the matter of tax liability by holding that the transaction was a tax-free reorgan-

ization within the meaning of section 112 (b) (4) and (d) (1) of the Revenue Act of 1928. Pursuant to such determination, the Board made no determination of the remaining issue namely the taxable year question. The Commissioner appealed from that decision and assigned error to the holding of tax-free reorganization. The petitioners here were appellees in the court below and contended that while that court might AFFIRM for any reason appearing in the record, the Court could only REVERSE upon the identical and single question decided by the Board. On that basis and that basis only it was argued that the findings made by the Board were amply sufficient to warrant affirmance of the judgment of no tax liability for the reason that it affirmatively appeared from the Findings of Fact and Opinion that no profit accrued to Silent-Automatic in the year 1932.

The question as to whether it was a 1931 or 1932 transaction was never argued to the Circuit Court of Appeals except insofar as it was contended that the *facts found by the Board* justified an affirmance of the judgment of no tax liability, on the basis of no profit being realized in 1932.

That tribunal stated "we are unimpressed with this argument" and then proceeded to enter into a finding of facts, entirely independent of the findings made by the Board and wholly refrained from discussing several of the most material facts in the record in the determination of the *accrual* of profit.

Briefly the determination entirely ignores the fact that petitioners are transferees of a corporation that reported profits on an *accrual* basis. The Court of Appeals stated "An executory contract was made on October 2, 1931" but entirely failed to particularize facts constituting it an "executory" rather than a "fully executed" contract.

The court likewise failed to discuss the effect of Secs. 9457 and 9458 Mich. C. L. 1929, in the determination of the year in which profit was realized or accrued to said Silent Automatic Corporation. The above sections of the statute are set forth in the brief hereto annexed.

The petition for rehearing and redetermination filed with said Circuit Court of Appeals and which is annexed to the record herein, amply raised the issues sought to be reviewed in this proceeding and the denial of that petition by the Appellate Court shows that petitioners have exhausted their remedies before that Court.

Briefly, while the Court of Appeals had no jurisdiction to REVERSE and remand for computation of tax liability, it had jurisdiction to REVERSE and remand for determination of the question of the taxable year by the Board of Tax Appeals, that being the tribunal which possessed the only ORIGINAL jurisdiction in this matter.

IV. BASIS UPON WHICH THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS

(a) This Honorable Court has jurisdiction to review the judgment of the Circuit Court of Appeals in this proceeding under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938; Title 28 U. S. C. A. Section 347.

(b) The statute of the United States involved in this proceeding is the Act of Congress known as the Revenue Act of 1928, approved May 29, 1928 (c. 852, 45 Stat. 791), the pertinent provisions of which are set forth in the Brief annexed hereto.

(c) The judgment of the Circuit Court of Appeals for the Sixth Circuit now sought to be reviewed was entered by the said Court on December 11, 1940 (R. 197) and is final and erroneous.

V. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

To govern the exercise of the discretionary powers conferred upon this Court by Section 240 of the Judicial Code, this Court adopted Rule 38, the material provisions of which are as follows,

> RULE 38 (5) (b). "Where a Circuit Court of Appeals has rendered a decision *in conflict* with the decision of another Circuit Court of Appeals on the same matter; or has decided an important question of local law in a way *probably in conflict* with applicable local decisions; or has decided an *important question* of general law in a way *probably untenable* or in conflict with the weight of authority; (or has decided an important question of Federal Law which has not been, but should be settled by this court;) or has decided a Federal question in a way *probably in conflict* with applicable decisions of this court; or has so far departed from the *accepted and usual course of judicial proceedings,* or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision etc."

The decision of the Circuit Court of Appeals of the Sixth Circuit in the instant proceeding gives rise to the

issuance of the writ of certiorari upon each and all of the grounds set forth in said Rule 38 with the possible exception of the portion set forth in parenthesis.

(a) The REVERSAL of the Board of Tax Appeals and the REMAND for computation of the amount of the tax was a usurpation by said Court of Appeals of the ORIGINAL jurisdiction of the Board of Tax Appeals and a DENIAL of petitioner's rights to a DAY IN COURT.

The above assumption of jurisdiction was a violation of that part of Rule 38 which reads as follows, "or has decided a Federal question in a way *probably in conflict* with applicable decisions of this court". It was also in violation of the following, "or has so far departed from the *accepted and usual course of judicial proceedings* * * * as to call for an exercise of this court's power of supervision."

(b) The decision of the Circuit Court of Appeals for the Sixth Circuit in the instant proceeding—holding that petitioners were liable as transferees of a corporation that *accrued* a profit in 1932—was violative of that portion of Rule 38 which reads as follows,

> "Where a Circuit Court of Appeals has rendered a decision *in conflict* with the decision of another Circuit Court of Appeals on the same matter".

This decision, upon the taxable year question, is in *direct conflict* with the decisions rendered in the following Circuits and in the following cases, all of which involved the same subject matter.

> Helvering v. Nibley-Mimnaugh Lbr. Co., 70 F. (2d) 843—C. A. D. C.; Commissioner v. North Jersey Title Ins. Co., 79 F. (2d) 492—C. C. A.—3; Brunton

v. Commissioner, 42 F. (2d) 81—C. C. A.—9; United States v. Utah-Idaho Sugar Co., 96 F. (2d) 756—C. C. A. 10 and Newaygo Portland Cement Co., v. Commissioner, 77 F. (2d) 536—64 App. D. C. 278.

(c) The Circuit Court of Appeals for the Sixth Circuit, in the case at bar, (in its holding on the taxable year question) violated the provision of Rule 38 which reads as follows,

> "or has decided an important question of *general law* in a way *probably untenable* or in *conflict* with the weight of authority" because,

(1) The only case cited by the court as authority for its position in the instant case was the case of Lucas v. North Texas Lumber Co., Supra, which case involved a ten-day option to purchase certain timber lands and is clearly distinguishable from the case at bar—the case at bar involving a binding agreement of purchase fully consummated in the prior year and fully approved by the stockholders of the selling company, thus making the decision of the Circuit Court on an important question of general law—*untenable.*

(2) Of the other cases cited by the Court, though for what purpose it does not readily appear, only one case lends any support whatever to the decision of the Sixth Circuit, namely the case of Case v. Commissioner, 9 Cir., 103 F. (2d) 283; but the above case is clearly distinguishable from the case at bar—there being no proof that the taxpayer therein kept books on an accrual basis, and it follows that that decision is not in point with the question herein.

(d) The decision of the Circuit Court of Appeals for the Sixth Circuit in the case at bar, and on the reorganization issue, while supported by the *obiter dicta* appearing in the case of LeTulle v. Scofield, 308 U. S. 415, 60 S. Ct. 313, 84 L. Ed. 355 is none-the-less *in conflict* with the decisions of this court in the following cases wherein the question of reorganization was directly before this court as justiciable matter. The decision of the Circuit Court of Appeals is therefore in conflict with the general law of tax-free reorganization laid down by this court in the following, Helvering v. Watts, 296 U. S. 387, 56 S. Ct. 275, 80 L. Ed. 289; Helvering v. Minnesota Tea Co., 296 U. S. 378, 56 S. Ct. 269, 80 L. Ed. 284 and Pinellas Ice and Cold Storage Co., v. Commissioner, 287 U. S. 462, 53 S. Ct. 257, 77 L. Ed. 428.

WHEREFORE, these petitioners pray that this Honorable Court will grant its writ or writs of certiorari directed to said Circuit Court of Appeals for the Sixth Circuit, requiring the complete record of this case or these cases in said court to be certified to this Court, and that this Court will thereupon REVERSE the said Circuit Court of Appeals and either REMAND the said cases to the Board of Tax Appeals for determination of the tax-year question, presented to but undecided by said Board, OR if it appear from the findings made by the Board of Tax Appeals that the judgment of the Board should be affirmed on the ground decided by the Board of Tax Appeals or upon any other ground appearing in the record, that this Honorable Court REVERSE the said Circuit Court of Appeals and AFFIRM the decision rendered by said Board

of Tax Appeals, or in some manner consonant with the jurisdiction of this Honorable Court to correct the manifest and grievous errors committed by the said Circuit Court of Appeals for the Sixth Circuit in the instant proceedings.

KARL B. SEGALL, Transferee

WALTER F. TANT, Transferee

By DON M. HARLAN,
Counsel for Petitioners.

Detroit, Michigan.
Dated March 8, 1941.